STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIO MARTINEZ,

Defendant-Appellant.

UNPUBLISHED
October 12, 1999

No. 203313
Wayne Circuit Court
LC No. 96-502738

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent prison terms of life without parole for the premeditated murder conviction, life without parole for the felony murder conviction, and fifteen to thirty years for the assault conviction. He was also sentenced to a consecutive, two-year prison sentence, to be served prior to the other sentences, for the felony-firearm conviction. Defendant now appeals as of right. We affirm, but remand for modification of the judgment of conviction and sentence to reflect only one conviction for first-degree murder, supported by two theories: premeditated murder and felony murder.

Defendant first argues that there was insufficient evidence of a larceny to sustain his conviction for felony murder based on larceny. When considering a challenge to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998).

The elements of felony murder are 1) the killing of a human being, 2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, 3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People*

v Kelly, 231 Mich App 627, 642-643; 588 NW2d 480 (1998). The murder need not be contemporaneous with the enumerated felony, but the defendant must have intended to commit the underlying felony when the homicide occurred. *Id.* at 643.

Here, defendant does not argue that the evidence was insufficient to prove that he murdered Nazih Zoma, but contends that the prosecutor failed to sufficiently prove that he did so while committing, attempting to commit, or assisting in the commission of an enumerated felony. Among the predicate felonies enumerated in the felony murder portion of the first-degree murder statute is "larceny of any kind." MCL 750.316(1)(b); MSA 28.548(1)(b). Larceny is generally defined as "the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). "Felonious intent" in this context does not describe the intent to commit a felony, but rather, the lack of a good faith belief that one is entitled to possession of the property, as is contemplated by the term "stealing." See *People v Pohl*, 202 Mich App 203, 205-206; 507 NW2d 819 (1993); *People v Mumford*, 171 Mich App 514, 518; 430 NW2d 770 (1988) ("Larceny . . . is complete as soon as there is the slightest taking of property with the intent to steal it").

The prosecutor presented evidence that Nazih Zoma's body was found in a locked bathroom with his pockets turned inside out. The wallet that he habitually carried, and that he had been carrying an hour or so earlier, was missing. It was reasonable for a rational trier of fact to conclude that when defendant shot Zoma and locked his body in the bathroom, he not only took his wallet, but searched his pockets for other valuables. In addition, there was evidence that during defendant's struggle with Thaira Hesano behind the counter, the cash register drawer was opened twice without connection to any transaction. The fact that money was left behind or that larceny may not have been the primary motive behind defendant's actions is irrelevant. When viewed in the light most favorable to the prosecution, the evidence was sufficient to support a finding that defendant intended to commit larceny when he killed Zoma.

Next, defendant raises several issues in connection with the trial court's refusal to grant an adjournment nine days before trial, the replacement of his appointed counsel, and the court's refusal to grant an adjournment after the jury had been selected. We review defendant's claim that he was denied his constitutional right to effective assistance of counsel to determine whether counsel's representation fell below an objective standard of reasonableness and whether the representation was so prejudicial to defendant that he was denied a fair trial. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). We review de novo defendant's claim that his constitutional right to counsel was violated by the trial court's denials of the adjournment requests and its decision to substitute counsel. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). The trial court's decisions to deny the adjournment requests are reviewed for an abuse of discretion. *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Nine days before trial, defendant filed a motion to adjourn trial on the basis that defense counsel had two other trials scheduled back-to-back, a substantial amount of discovery information had only recently been turned over, there were thirty-one witnesses on the prosecution's list, and in order to

provide defendant with the effective assistance of counsel, an adjournment allowing more time for preparation was necessary. The trial court denied defendant's motion to adjourn trial, and instead, appointed new counsel. Defendant asserts that the court impermissibly interfered with his constitutional right to counsel by removing and replacing defendant's counsel nine days before trial.

"The arbitrary, unjustified removal of a defendant's appointed counsel by the trial court during a critical stage in the proceedings, over the objection of the defendant, violates the defendant's Sixth Amendment right to counsel." *People v Johnson*, 215 Mich App 658, 664; 547 NW2d 65, app dis 453 Mich 900 (1996). However, defendant does not argue on appeal that he objected to the substitution. Furthermore, defendant has failed to provide a transcript of the relevant proceeding. Consequently, we deem this issue abandoned. *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992). Moreover, the record indicates that defendant's original counsel was scheduled to be in trial in another part of the state and would be too busy to prepare for trial in the instant case. We cannot conclude that substitution of counsel under these circumstances was either arbitrary or unjustified. Thus, defendant has not established that the substitution of his appointed counsel nine days before trial violated his Sixth Amendment right to counsel. See *Johnson, supra* at 665-666.

Defendant further argues that the trial court's denials of his motions to adjourn denied him the effective assistance of counsel because they prevented his substitute counsel from being prepared for trial and from presenting critical defenses. A defendant can be denied the effective assistance of counsel where the trial court prevents the defendant from receiving the benefits of the constitutional right to counsel. *Mitchell, supra* at 153. However,

> [n]ot every restriction on counsel's . . . opportunity to investigate . . . or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. . . . [O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. [*Id.* at 159, quoting *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983).

Here, defendant has not shown that, due to the trial court's denial of the motions to adjourn, his counsel's performance fell below an objective standard of reasonableness, or that the representation was prejudicial to the extent that it denied him a fair trial. *Mitchell, supra* at 159-160, 164-165. To demonstrate prejudice, defendant must show that, but for counsel's errors, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Despite defendant's contention that the trial court's denial of his motion to adjourn so that substitute counsel could investigate an insanity/diminished capacity defense prevented substitute counsel from presenting the defense, there are no facts in the record indicating that such a defense was applicable. In addition, it was defendant's original trial counsel's failure to provide notice of an intent to pursue such a defense thirty days before trial, as required by MCL 768.20a(1); MSA 28.1043(1)(1), that precluded substitute counsel from considering the defense, not the court's refusal to grant an adjournment. Where an insanity/diminished capacity defense would have been inconsistent with defendant's theory that he did not commit the alleged crimes, defendant's original trial counsel's decision not to pursue an insanity/diminished capacity defense was a matter of trial strategy that this Court will not second-guess. *People v Rice (On Remand)*, 235 Mich App 429, 445; ___ NW2d ___ (1999).

Defendant next asserts that the trial court's denial of substitute counsel's request during trial for an adjournment for the purpose of investigating the possibility that a disgruntled employee was the perpetrator of the alleged crimes, denied him the effective assistance of counsel because it prevented substitute counsel from presenting a critical defense. However, defendant has not shown that he was prejudiced by substitute counsel's failure to investigate or present such a defense. Because defendant did not move for a *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). We cannot conclude from the record before us that the result of the proceedings would have been different had trial been adjourned for an investigation into whether a disgruntled employee committed the alleged crimes. *Pickens*, *supra* at 314. Furthermore, although defendant argues in general terms that, due to the trial court's denials of the motions to adjourn, substitute counsel was "unprepared to defend against these very serious charges," he does not indicate how he was prejudiced by the alleged unpreparedness. Thus, he has not demonstrated a denial of his right to the effective assistance of counsel.

We further note that the trial court did not abuse its discretion in denying the motions to adjourn. To establish that the trial court abused its discretion in this regard, defendant must demonstrate that he was prejudiced by the denial of the motions. *Paquette*, *supra* at 344; *Lawton*, *supra* at 348. Because, as explained above, defendant has not done so, he has not shown that the trial court's denials of the motions to adjourn constituted abuses of the trial court's discretion.

Finally, defendant contends, and the prosecution concedes, that the convictions and sentences for first-degree premeditated murder and first-degree felony murder, arising from the death of a single victim, violate double jeopardy principles. We agree, and note that "the appropriate remedy . . . is to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Bigelow*, 229 Mich App 218, 220-222; 581 NW2d 744 (1998).

We remand this case for modification of the judgment of conviction and sentence in accordance with this opinion. Defendant's convictions and sentences are in all other respects affirmed. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).